

No. 11732

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. W. MALONEY, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

R. C. GLOVER, M. C. FINDLEY and TINKHAM
GILBERT, Trustees under the Will of Sarah
E. Carrier, deceased,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

DEC 11 1947

PAUL A. O'BRIEN,

CLERK

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J. W. MALONEY, Collector of Internal Revenue
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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OF RECORD

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For Appellees.

In the District Court of the United States
for the District of Oregon

Civil No. 3149

R. C. GLOVER, M. C. FINDLEY and TINKHAM
GILBERT, Trustees Under the Will of
SARAH E. CARRIER, Deceased,
Plaintiffs,

vs.

J. W. MALONEY, Collector of Internal Revenue
for the District of Oregon,
Defendant.

COMPLAINT

I.

This is an action for the recovery of income taxes illegally collected from plaintiffs' predecessors in interest by defendant. Jurisdiction is based on Section 24 (5) of the Judicial Code of the United States, Title 28, Section 41, Subdivision 5, United States Code.

II.

Plaintiffs are the trustees under the will of Sarah E. Carrier, who died on January 27, 1940. Defendant is the United States Collector of Internal Revenue for the District of Oregon.

III.

The Last Will and Testament of the said Sarah E. Carrier, after providing for certain specific be-

quests, devised and bequeathed the residue and remainder of her estate to designated charitable, religious and educational organizations as follows: 5/20ths thereof directly to designated charitable, religious and educational organizations, and the remaining 15/20ths thereof to plaintiffs herein in trust for a period of ten years from the date of death of the testatrix. Plaintiffs were directed by paragraph fourteen of said will to safely invest the said 15/20ths of the residue and remainder of the estate and to use the income therefrom for the care and maintenance of such blood relatives of the testatrix and her deceased husband who in the judgment of the trustees were in need of financial assistance, if any there should be. The trustees were further directed to distribute the corpus and all unexpended interest and income to designated charitable, religious and educational organizations upon the expiration of the trust.

IV.

The administratrices of the estate, plaintiffs' predecessors in interest, filed income tax returns for the estate for the period from January 27, 1940, to December 31, 1940, and for the calendar year 1941, and erroneously paid to defendant the full amount of tax on all net income received by the estate during said periods without making the deductions authorized by Section 162 (a) of the Internal Revenue Code.

V.

The Estate of said Sarah E. Carrier remained in the process of administration until March 30, 1943, when 15/20ths of the residue and remainder of the estate was transferred to plaintiffs herein as trustees aforesaid. No payments were made to said relatives during the course of administration of the estate.

VI.

Defendant voluntarily refunded the tax upon 5/20ths of the income for each of said periods and thereafter plaintiffs filed claims for refund of \$3,410.20 for the period from January 27, 1940, to December 31, 1940, and \$3,519.69 for the calendar year 1941, which amounts represented the remaining 15/20ths of said tax payments. The said claims for refund were denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on April 15, 1946.

Wherefore, plaintiffs pray for judgment in the amount of \$6,929.89 with interest thereon from the dates of payment and for their costs and disbursements herein.

CARL E. DAVIDSON,
CHARLES P. DUFFY,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 20, 1946.

[Title of District Court and Cause.]

ANSWER

The defendant, by his attorneys, Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, and for answer to the complaint on file herein states:

I.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs I to VI inclusive, and therefore denies the same and the whole thereof.

Wherefore, defendant asks that the complaint herein be dismissed and that he have his costs and disbursements herein.

HENRY L. HESS,

United States Attorney.

/s/ VICTOR E. HARR,

Assistant United States Attorney.

State of Oregon,

County of Multnomah—ss.

Due service of the within Answer is hereby accepted at Portland, Oregon, this 19th day of July, 1946, by receiving a copy thereof duly certified to as such by Victor E. Harr, of attorneys for defendant.

/s/ REILLY & DAVIDSON,

Attorneys for Plaintiff.

[Endorsed]: Filed July 19, 1946.

[Title of District Court and Cause.]

AMENDED ANSWER

The defendant by his attorney, Henry L. Hess, United States Attorney for the District of Oregon, for his amended answer to the complaint herein, respectfully alleges:

I.

That he admits the averments contained in paragraph I of the complaint, except that he denies that the taxes were illegally collected, and that he has no knowledge or information sufficient to form a belief as to the truth of the implication that the plaintiffs are the successors in interest to the parties who paid the taxes.

II.

That he admits the averments contained in paragraph II of the complaint, except that he has no knowledge or information sufficient to form a belief as to the truth of the averment that plaintiffs are the trustees under the will of Sarah E. Carrier.

III.

That he denies the averments contained in paragraph III of the complaint, except it is admitted that the property referred to in the paragraph is held under and subject to the terms and provisions of the last will and testament of Sarah E. Carrier, deceased.

IV.

That he denies the averments contained in paragraph IV of the complaint, except that he admits that income tax returns were filed for the periods specified; that the tax disclosed by the returns was paid; and that thereafter part of the tax paid was refunded.

Wherefore, defendant demands judgment dismissing the complaint together with the costs of this action.

/s/ HENRY L. HESS,
United States Attorney.

/s/ VICTOR E. HARR,
Assistant United States Attorney.

United States of America,
District of Oregon—ss.

Due and legal service of the within Amended Answer is hereby accepted within the State and District of Oregon, on the 14th day of August, 1946, by receiving a copy thereof duly certified to as true and correct copy of the original by Victor E. Harr, Assistant United States Attorney for the District of Oregon.

/s/ CARL E. DAVIDSON,
Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 14, 1947.

[Title of District Court and Cause.]

ORDER AUTHORIZING PLAINTIFFS TO
SERVE AND FILE SUPPLEMENTAL
COMPLAINT

The above matter coming on for hearing on this 23rd day of September, 1946, on plaintiffs' motion for leave to serve and file a supplemental complaint herein, plaintiffs appearing by Charles P. Duffy, one of their attorneys, and defendant appearing by Victor E. Harr, Assistant United States Attorney, one of his attorneys, and the Court having considered the motion and the stipulation between the parties hereto,

Now, Therefore, It Is Hereby Ordered that plaintiffs may serve and file a supplemental complaint herein to add their claim for the recovery of income taxes alleged to have been illegally collected from plaintiffs' predecessors in interest by defendant for the year 1942 in the amount of \$3,627.60, and

It Is Further Ordered that defendant's amended answer to the original complaint herein may serve as the answer to said supplemental complaint.

Dated at Portland, Oregon, this 23rd day of September, 1946.

CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed Sept. 23, 1946.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

I.

The administratrices of the estate, plaintiffs' predecessors in interest, filed an income tax return for the estate for the calendar year 1942, and erroneously paid to defendant the full amount of tax on all net income received by the estate during said year without making the deductions authorized by Section 162 (a) of the Internal Revenue Code.

II.

Defendant voluntarily refunded the tax upon 5/20ths of the income for the calendar year 1942 and thereafter plaintiffs filed a claim for refund of \$3,627.60, which amount represented part of the remaining 15/20ths of said tax payment. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on August 29, 1946.

Wherefore, plaintiffs pray for judgment in the amount of \$3,627.60 with interest thereon from the date of payment and for their costs and disbursements herein, in addition to the relief prayed for in the original complaint herein.

CHARLES P. DUFFY,

Of Attorneys for Plaintiffs.

Due service of the within Supplemental Complaint is hereby acknowledged this 20th day of September, 1946, at Portland, Oregon.

/s/ VICTOR E. HARR,

Assistant United States Attorney,
Attorneys/Solicitors for Defendant.

[Endorsed]: Filed Sept. 23, 1946.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause having come on regularly for pre-trial conference before the Honorable Claude McColloch, one of the Judges of the above-entitled Court, at Portland, Oregon, on the 25th day of November, 1946, plaintiffs R. C. Glover and Tinkham Gilbert appearing in person and all plaintiffs appearing by Carl E. Davidson and Charles P. Duffy, their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the Attorney General of the United States, the following proceedings were had and done:

Admitted Facts

It appears from the pleadings and the pre-trial proceedings that the following facts are admitted and may be taken and deemed by the court on the trial as established facts therein:

I.

That plaintiffs are the trustees under the will of Sarah E. Carrier, who died on January 27, 1940, and defendant is the United States Collector of Internal Revenue for the District of Oregon.

II.

That the administratrices et al. of the estate of Sarah E. Carrier, plaintiffs' predecessors in interest, filed income tax returns for the estate for the period from January 27, 1940, to December 31, 1940, and for the calendar years 1941 and 1942, and paid to defendant the full amount of tax on all net income received by the estate during said periods.

III.

That the estate of Sarah E. Carrier remained in the process of administration until March 30, 1943, when 15/20ths of the residue was transferred to plaintiffs herein as trustees in accordance with the terms of the said will.

IV.

That none of the income received by the administratrices during the course of administration for the period covered by this action was from the sale of capital assets, and, therefore, "capital gains" are not involved herein.

V.

That defendant voluntarily refunded the tax upon

5/20ths of the income for each of said periods and thereafter plaintiffs filed claims for refund of the amounts representing the remaining 15/20ths of the said tax payments; that thereafter said claims for refund were denied by the Commissioner of Internal Revenue by registered letters mailed to plaintiffs.

VI.

That the organizations enumerated in paragraph fourteen of the said will are charitable and religious organizations within the purview of Sections 23 (o) and 162 (a) of the Internal Revenue Code of the United States.

Plaintiffs' Contentions

I.

That under the provisions of paragraph fourteen of the will no payments were or could have been made to said relatives of the decedent during the course of administration of the estate.

II.

That the income received by the administratrices during the course of administration of the estate was permanently set aside for charitable purposes so as to allow the deductions authorized by Section 162 (a) of the Internal Revenue Code.

III.

That the income of the trust has been and will be so greatly in excess of claims that there is no

practical possibility that the unused annual income of the trust will ever be used for noncharitable purposes.

IV.

That the taxes in question were illegally collected from plaintiff's predecessors in interest by defendant by reason of the defendant's failure to allow the deductions authorized by Section 162 (a) of the Internal Revenue Code.

Defendant's Contentions

I.

The decedent did not "mandatorily" direct in her will that all of her estate should be distributed to the trustees of the trust described in paragraph Fourteenth (6) thereof but only the portion of her "general estate" which remained after its administration was completed and distributed in accordance with the laws of Oregon and the terms of her will. It is the ordinary income of the general estate of the decedent before any division or distribution thereof was made that is involved between the period January 27, 1940 (date of death), and March 30, 1943, and the income of the trust from March 30, 1943, to December 31, 1943.

None of the income in question is attributable to "capital gains" and there is no contention that the blood relatives of the decedent and her deceased husband would have been entitled to any.

II.

By the terms of her will the decedent directed that 15/20ths of her "estate" which remained after the administration thereof was completed should be distributed to the trustees of the trust described in paragraph Fourteenth (6) to be held by them for a period of ten years from her death before any division or distribution of what might exist then of its assets and unused income should be made to the remainder beneficiaries. Neither a division nor a distribution amongst the remainder beneficiaries was authorized before the expiration of the ten-year period.

Pending the expiration of the ten-year period the trustees were required to "devote" all of the income (current and accumulated) derived from the 15/20ths portion of her estate "to the care and maintenance of such blood relatives of myself and of my deceased husband, the late Burton E. Carrier, not further removed than first cousins, who, in the judgment of said trustees are in need of financial assistance * * *."

III.

The Probate Court did not authorize the administratrices to set aside permanently any income of the estate for charitable purposes during the period it was in the course of administration and the trustees were not empowered to put the income of the trust beyond their power to use for the purpose stated in the will of the decedent during the years involved.

It would have been proper and necessary for the Probate Court to authorize the income of the estate to be devoted to the care of such of the blood relatives of the decedent and her deceased husband as needed care prior to the completion of the administration of the estate.

IV.

Neither the financial condition of the trust nor the needs of the blood relatives of the decedent and her deceased husband can be appraised nor estimated with reasonable accuracy throughout the period provided for the duration of the trust.

If the financial needs of the blood relatives, et cetera, require it, all of the income of the estate and the trust which the administratrices and the trustees are shown to have accumulated before January 27, 1950, must be devoted to their care and relief.

V.

The administratrices of the estate could not have defeated the income benefits provided for the blood relatives of the decedent and her deceased husband by merely keeping open the administration of the estate for the period of ten years. The rights of the blood relatives to the income were present throughout such years.

VI.

The taxes in question were determined correctly and assessed and collected according to law.

Issues of Fact and Law to Be Determined

I.

Whether the income received during the course of administration was permanently set aside for charitable purposes so as to authorize the deductions allowed by Section 162 (a) of the Internal Revenue Code.

II.

Whether the income of the trust was so greatly in excess of claims as to exclude any practical possibility that the unused income would ever be used for noncharitable purposes.

III.

Whether plaintiffs are entitled to a refund of the taxes paid as prayed for in the complaint and supplemental complaint herein.

Exhibits

Certain exhibits were introduced in evidence by plaintiffs as pre-trial exhibits, the same being:

1. Copy of federal tax return for the Estate of Sarah E. Carrier, deceased, for the period from January 27, 1940, to December 31, 1940.
2. Copy of federal tax return for the Estate of Sarah E. Carrier, deceased, for the calendar year 1941.
3. Copy of federal tax return for the Estate of Sarah E. Carrier, deceased, for the calendar year 1942.

4. Copy of claim for refund covering period from January 27, 1940, to December 31, 1940.
5. Copy of claim for refund covering calendar year 1941.
6. Copy of supplementary claim for refund covering calendar year 1941.
7. Copy of claim for refund covering calendar year 1942.
8. Copy of supplementary claim for refund covering calendar year 1942.
9. Letter from Commissioner of Internal Revenue denying claims for 1940 and 1941.
10. Letter from Commissioner of Internal Revenue denying claims for 1942.
11. Certified copies of Will, Final Account, Supplemental Account, Order Approving Final Account and Directing Distribution, and Second Supplemental Account of Administratrices.
12. Certified copies of Report of Trustees and Decree in re Trustees v. Oregon Annual Conference Board of Education, Methodist Church.

It is agreed by the parties that this pre-trial order will govern the course of the trial and will not be amended except by consent or to prevent manifest injustice, and the Court finding that the

foregoing clearly and accurately reflects the pre-trial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said Pre-Trial Order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the Court.

Done and dated this 6th day of January, 194....

CLAUDE McCOLLOCH,
Judge.

Approved:

CARL E. DAVIDSON,
Of Attorneys for Plaintiffs.

THOMAS R. WINTER,
Of Attorneys for Defendant.

[Endorsed]: Filed Jan. 6, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause having come on regularly for trial without a jury before the Honorable Claude McCulloch, one of the Judges of the above-entitled

court, at Portland, Oregon, on the 6th day of January, 1947; plaintiffs R. C. Glover and Tinkham Gilbert appearing in person and all plaintiffs appearing by Carl E. Davidson and Charles P. Duffy, their attorneys; defendant appearing by Thomas R. Winter, Special Assistant to the Attorney General of the United States, and

The parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pre-trial order previously made and entered herein, and

The court having thereafter considered fully all matters of fact and law presented by the parties and being at this time fully advised does make the following

Findings of Fact

I.

That plaintiffs are the trustees under the Will of Sarah E. Carrier who died on January 27, 1940, and defendant is the United States Collector of Internal Revenue for the District of Oregon.

II.

The Last Will and Testament of the said Sarah E. Carrier, after providing for certain specific bequests, devised and bequeathed the residue and remainder of her estate to designated charitable, religious and educational organizations as follows: 5/20ths thereof directly to designated charitable, religious and educational organizations and the

remaining 15/20ths thereof to plaintiffs herein as trustees upon the following terms:

“* * * to be held by them in trust for ten years after my decease, and safely invested by them and the income derived therefrom to be devoted to the care and maintenance of such blood relatives of myself and of my deceased husband, the late Burton E. Carrier, not farther removed than first cousins, who in the judgment of said trustees are in need of financial assistance, if any there should be, and in such sums as may seem wise to said trustees, it being my direction that the corpus of said trust fund be kept intact and such interest and income derived therefrom as is not used for the purposes above indicated to be added thereto and upon the expiration of said trust period of ten years after my decease said trustees divide all of the funds in their possession as such trustees, including the corpus of said trust fund and accumulated interest and income derived therefrom and not otherwise disposed of under the authority herein conferred, into four parts, of equal value, and execute such instruments as may be required by the laws of Oregon to transfer the same in equal portions to the following institutions,” (naming them)

III.

That the administratrices c. t. a. of the estate of Sarah E. Carrier, plaintiffs' predecessors in inter-

est, filed income tax returns for the estate for the period from January 27, 1940, to December 31, 1940, and for the calendar years 1941 and 1942 and paid to defendant the full amount of tax on all net income received by the estate during said periods.

IV.

That the estate of Sarah E. Carrier remained in the process of administration until March 30, 1943, when 15/20ths of the residue was transferred to plaintiffs herein as trustees in accordance with the terms of the said will. No payments were made to said relatives during the course of administration of the estate.

V.

On March 15, 1941, the administratrices filed their income tax return for said estate for the period from January 27, 1940, through December 31, 1940, in which they disclosed that the estate had received net income during said period in the amount of \$25,356.42; on March 16, 1942, the administratrices filed their return for the year 1941 in which they disclosed that the estate of the decedent received net income during the calendar year of 1941 in the amount of \$21,784.04; on February 24, 1943, the administratrices filed their return for the year 1942 in which they disclosed that the estate of the decedent received net income during the calendar year 1942 in the amount of \$24,592.67.

VI.

Defendant voluntarily refunded the tax upon 5/20ths of the income for each of said periods, and thereafter plaintiffs filed claims for refund of \$3,410.20 for the period from January 27, 1940, to December 31, 1940, \$3,519.69 for the calendar year 1941 and \$3,627.60 for the calendar year 1942, which amounts represented the remaining 15/20ths of said tax payments. The claims for refund were denied by the Commissioner of Internal Revenue by registered letters mailed to plaintiffs on April 15, 1946, and August 29, 1946.

VII.

The organizations enumerated in paragraph fourteen of the said will are charitable and religious organizations within the purview of Section 23 (o) and 162 (a) of the Internal Revenue Code of the United States.

VIII.

The testamentary trust was established on March 30, 1943, and the gross income, expenses and amounts paid to indigent relatives since that time have been as follows:

Period	Gross Income*	Expenses	Payments
3/31/43 to 12/31/43	\$21,536.02	\$2,100.00	\$ 675.00
1944	26,147.74	2,540.63	1,800.00
1945	23,101.16	1,438.86	1,800.00
1946	22,667.09	694.63	1,800.00
Totals.....	\$93,452.01	\$6,744.12	\$6,075.00

*Includes the 5/20ths interest of the charitable organizations which received their shares directly. Their shares have been administered by the same trustees pursuant to an agreement between such organizations and the trustees to effect an orderly liquidation and disposition of the assets of the estate.

From the foregoing Findings of Fact the court draws the following

Conclusions of Law

I.

That the income received by the administratrices during the course of administration of the estate was, pursuant to the terms of the will, permanently set aside for the purposes and in the manner specified in Section 23 (c) of the Internal Revenue Code of the United States.

II.

That the taxes in question were illegally collected from the plaintiffs' predecessors in interest by defendant by reason of the defendant's failure to allow the deductions authorized by Section 162 (a) of the Internal Revenue Code of the United States.

III.

That by reason of the foregoing plaintiffs are entitled to recover judgment against defendant for the sum of \$3,410.20, together with interest thereon at the rate of 6 per cent per annum from March 15, 1941; for the sum of \$3,519.69, together with interest thereon at the rate of 6 per cent per annum from March 16, 1942; for the sum of \$3,627.60, together with interest thereon at the rate of 6 per cent per annum from February 24, 1943, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 4th day of March, 1947.

CLAUDE McCOLLOCH,
District Judge.

Due service of the within Findings of Fact and Conclusions of Law is hereby acknowledged this 3rd day of March, 1947, at Portland, Oregon.

/s/ J. ROBERT PATTERSON,
Of Attorneys for Defendant.

[Endorsed]: Filed March 4, 1947.

In the District Court of the United States
for the District of Oregon

Civil No. 3149

R. C. GLOVER, M. C. FINDLEY and TINKHAM
GILBERT, Trustees Under the Will of
SARAH E. CARRIER, Deceased,
Plaintiffs,

vs.

J. W. MALONEY, Collector of Internal Revenue
for the District of Oregon,
Defendant.

JUDGMENT

This cause having come on regularly for trial without a jury before the Honorable Claude Mc-

Colloch, one of the Judges of the above-entitled court, at Portland, Oregon, on the 6th day of January, 1947; plaintiffs R. C. Glover and Tinkham Gilbert appearing in person and all plaintiffs appearing by Carl E. Davidson and Charles P. Duffy, their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the Attorney General of the United States, and

The parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pre-trial order previously made and entered herein, and

The court having considered fully all matters of fact and law presented by the parties, and Findings of Fact and Conclusions of Law having been submitted by plaintiffs, which Findings of Facts and Conclusions of Law have heretofore been signed by the court and entered of record on the 4th day of March, 1947.

Now, Therefore, based upon the foregoing Findings of Fact and Conclusions of Law

It Is Hereby Considered, Ordered and Adjudged that plaintiffs have and recover judgment of and from defendant for the sum of \$3,410.20, together with interest thereon at the rate of 6 per cent per annum from March 15, 1941; for the sum of \$3,519.69, together with interest thereon at the rate of 6 per cent per annum from March 16, 1942; for the sum of \$3,627.60, together with interest thereon at the rate of 6 per cent per annum from

February 24, 1943, and for their costs and disbursements incurred therein.

Dated at Portland, Oregon, this 4th day of March, 1947.

CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed March 4, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: R. C. Glover, M. C. Findley and Tinkham Gilbert, Trustees under the Will of Sarah E. Carrier, Deceased, as above named and Carl E. Davidson and Charles P. Duffy, Attorneys for Plaintiffs:

You and each of you will please take notice that the Defendant J. W. Maloney, Collector of Internal Revenue for the District of Oregon, appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain Judgment in the above entitled cause, made and entered the 4th day of March, 1947, by the Honorable Claude McCulloch, United States District Judge, wherein the Plaintiffs recovered a judgment for the sum of \$3,410.20, together with interest thereon at the rate of 6 per cent per annum from March 15, 1941; and for the sum of \$3,519.69, together with interest thereon at the rate of 6 per cent per annum from March 16,

1942; and for the sum of \$3,627.60 together with interest thereon at the rate of 6 per cent per annum from February 24, 1943, and for their costs and disbursements incurred therein under a suit for the recovery of income taxes illegally collected from Plaintiffs' predecessors in interest by the defendant.

HENRY L. HESS,

United States Attorney for the
District of Oregon.

/s/ HERMAN H. HAHNER,

Assistant United States Attorney.
Attorneys for Defendant.

United States of America,
District of Oregon—ss.

I, Herman H. Hahner, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Notice of Appeal, on the within Plaintiff, by depositing in the United States Post Office, at Portland, Oregon, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Reilly and Davidson, and Charles P. Duffy, 1525 Yeon Building, Portland, Oregon, Attorneys for Plaintiff.

/s/ HERMAN H. HAHNER,

Assistant United States Attorney.

[Endorsed]: Filed May 29, 1947.

[Title of District Court and Cause.]

ORDER

This Matter coming on to be heard ex parte this day upon motion of defendant, through his attorney, Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an order extending time for the filing of the record on appeal and docketing the within action in the Circuit Court of Appeals, for the reason that the Department of Justice has not had sufficient time to consider said appeal, and for the further reason that defendant has just ordered a transcript of the proceedings and testimony, and the Court being fully advised in the premises,

It Is Ordered that the time for filing the within appeal and docketing the action be, and it is hereby, extended to ninety days from the first date of the Notice of Appeal.

Made and entered at Portland, Oregon this 24th day of June, 1947.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 24, 1947.

United States Circuit Court of Appeals
for the Ninth Circuit

R. C. GLOVER, M. C. FINDLEY and TINK-
HAM GILBERT, Trustees Under the Will of
SARAH E. CARRIER, Deceased,

Appellants,

vs.

J. W. MALONEY, Collector of Internal Revenue
for the District of Oregon,

Appellee.

ORDER

This matter coming on to be heard this date upon motion of Appellee through his attorneys, Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an Order extending time for filing of the record and docketing the appeal in the within action for the reason that the Attorney General desires to consider the necessity and desirability of appealing this case, and the Court having considered said Motion and supporting Affidavit, and the Stipulation of the parties, and being advised in the premises,

It Is Ordered that the time for filing the record on appeal in the within action be, and it is hereby, extended thirty (30) days from and after August 27, 1947.

Made and entered at San Francisco, California, this 25th day of August, 1947.

FRANCIS A GARRECHT,

Judge.

A true copy, Aug. 26, 1947.

[Seal] Attest: Paul P. O'Brien.

[Endorsed]: Filed Aug. 26, 1947.

In the District Court of the United States
for the District of Oregon

Civil No. 3149

R. C. GLOVER, M. C. FINDLEY and TINK-
HAM GILBERT, Trustees Under the Will of
SARAH E. CARRIER, Deceased,
Plaintiffs,

vs.

J. W. MALONEY, Collector of Internal Revenue
for the District of Oregon,
Defendant.

ORDER TRANSMITTING ORIGINAL
EXHIBITS

On Motion of the Defendant, and appellant,
herein, and good cause appearing therefor, it is
hereby ordered,

That all of the original exhibits in the above case
be transmitted to the Circuit Court of Appeals, in
connection with the appeal of this case.

Dated this 9th day of Sept., 1947.

CLAUDE McCOLLOCH,
Judge.

Copy received: 9/9/47. Charles P. Duffy, of
Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 9, 1947.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
DEFENDANT INTENDS TO RELY ON
APPEAL

The defendant, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered by the District Court for the District of Oregon, hereby designates the following points to be relied on in the prosecution of said appeal:

I.

That the District Court erred by holding that the income from the fifteen-twentieths of the residuum of the estate of Sarah E. Carrier, Deceased, was during the three years of administration permanently set aside for charitable institutions designated in Section 23 (o) of the Internal Revenue Code.

II.

That the District Court erred by holding that the income from fifteen-twentieths of the residuum of the estate was exempt from taxation under Section 162 (a) of the Internal Revenue Code.

III.

That the District Court erred in that portion of its findings of fact numbered VII, to wit, that the income of the trust has been and will be so greatly in excess of claims that there is no practical possibility that the unused annual income of the trust will ever be used for non-charitable purposes.

IV.

That the District Court erred in that portion of its findings of fact numbered IX, to wit, that under the provisions of paragraph fourteen of the will of Sarah E. Carrier, Deceased, no payments could have been made to said relatives during the course of administration of the estate.

V.

That the District Court erred in failing and refusing to order judgment for the defendant and against the plaintiff.

Dated this 9th day of Sept., 1947.

/s/ HENRY L. HESS,
United States Attorney.

/s/ VICTOR E. HARR,
Assistant United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the United
States Attorney.
Attorneys for Defendant.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Statement of Points on Which Defendant Intends to Rely on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Portland, Oregon, this 9th day of Sept., 1947, by receiving

copy thereof, duly certified as such by Thomas R. Winter, of attorneys for the defendant.

/s/ CHARLES P. DUFFY,
Of Counsel for Plaintiffs.

[Endorsed]: Filed Sept. 9, 1947.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above-Entitled Court:

Defendant, J. W. Maloney, United States Collector of Internal Revenue for the District of Oregon, hereby designates the entire record in this case to be contained in the record on appeal, more particularly described as follows:

1. Complaint.
2. Answer.
3. Amended Answer.
4. Supplemental Complaint.
5. Order Authorizing Plaintiffs to Serve and File Supplemental Complaint.
6. Pre-Trial Order.
7. Transcript of proceedings of the pre-trial and trial on November 25, 1946, and January 6, 1947.
8. All exhibits.
9. Findings of Fact and Conclusions of Law.
10. Judgment.

11. Notice on Appeal.
12. Order Extending Time to Docket Record on Appeal.
13. Order (CCA-9) Extending Time to Docket Record on Appeal.
14. Order Transmitting Original Exhibits.
15. Statement of Points on which Defendant Intends to Rely on Appeal.
16. This Designation.

Dated this 9th day of Sept., 1947.

/s/ HENRY L. HESS,
United States Attorney.

/s/ VICTOR E. HARR,
Assistant United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the United
States Attorney.
Attorneys for Defendant.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Designation of Contents of Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Portland, Oregon, this 9th day of September, 1947, by receiving copy thereof, duly certified as such by Thomas R. Winter, of Attorneys for the Defendant.

/s/ CHARLES P. DUFFY,
Of Counsel for Plaintiffs.

[Endorsed]: Filed September 9, 1947.

[Title of District Court and Cause.]

DOCKET ENTRIES

1946

May 20—Filed complaint.

20—Issued summons—to marshal.

21—Filed affidavit of Charles P. Duffy.

21—Filed acceptance of service.

24—Filed summons with marshal's return.

July 19—Filed Answer of Deft.

Aug. 14—Filed amended answer of deft.

Sept. 10—Filed motion of pltffs. for order to serve
and file supplemental complaint.

23—Filed stipulation for order allowing filing
of supplemental complaint.

23—Filed and entered order allowing filing of
supplemental complaint. McC.

23—Filed supplemental complaint.

Oct. 28—Entered order setting for pre-trial on
Nov. 25, 1946. McC.

Nov. 25—Entered order resetting for trial on Jan.
6, 1947—2 p.m. McC.

1947

Jan. 6—Filed and entered pre-trial order. McC.

6—Record of trial and order for ptff. to sub-
mit brief in 15 days; deft. 30 days there-
after and ptff's reply 15 days thereafter.
Exhibits in file. McC.

20—Filed plaintiff's brief.

Feb. 20—Filed brief of defendant.

Mar. 4—Filed and entered Findings of Fact and
Conclusion of Law. Notices. McC.

1947

4—Filed and entered Judgment for plaintiffs (see judgment) notices McC.

7—Filed cost bill of plaintiff.

May 29—Filed notice of appeal by defendant.

June 24—Filed and entered order extending time 90 days from notice of appeal to file and docketing appeal. McC.

July 7—Filed Transcript of Proceedings Nov. 25, 1946—Jan. 6, 1947.

Aug. 28—Filed copy order C.C.of A. extending time 30 days after Aug. 27, to appeal.

Sept. 9—Filed and entered order to send original exhibits to C.C.of A. McC.

9—Filed statement of points by defendant.

9—Filed designation of contents of record on appeal.

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 35 inclusive, constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered Civil 3149, in which J. W. Maloney, Collector of Internal Revenue for the District of Oregon is defendant and

appellant and R. C. Glover, M. C. Findley and Tinkham Gilbert, Trustees under the Will of Sarah E. Carrier, Deceased are plaintiffs and appellees; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of pre-trial and trial proceedings dated November 25, 1946 and January 6, 1947, and original exhibits 1 to 12 inclusive.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 17th day of September, 1947.

[Seal]

LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy.

In the District Court of the United States
for the District of Oregon

Civil No. 3149

R. C. GLOVER, M. C. FINDLEY and TINKHAM
GILBERT, Trustees Under the Will of
SARAH E. CARRIER, Deceased,
Plaintiffs,

vs.

J. W. MALONEY, Collector of Internal Revenue
for the District of Oregon,
Defendant.

Portland, Oregon, November 25, 1946.

Before: Honorable Claude McColloch,
Judge.

Appearances:

Mr. Carl E. Davidson and Mr. W. C. Winslow,
Attorneys for Plaintiffs.

Mr. Victor E. Harr, Assistant United States Attorney, and Mr. Thomas R. Winter, Special Assistant to the United States Attorney, Attorneys for the Defendant.

PROCEEDINGS OF PRE-TRIAL AND TRIAL

Mr. Davidson: Civil No. 3149, Glover, et al., vs. Maloney, involves a claim for refund of income taxes paid [1*] by the Estate of Sarah E. Carrier, at Salem, Oregon, who died in January, 1940. Refund is claimed for the years 1940, 1941 and 1942.

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

Plaintiffs in this case have filed two claims. One claim was denied and the other claim was filed and denied after the complaint was filed in this case, and it has been pleaded by way of supplemental complaint and answer.

The question involved is whether or not the accumulated income of this estate of this decedent during the course of administration was or was not set aside for charitable uses. The Internal Revenue Code, Section 162 (a), provides for certain deductions where income is set aside for any charitable, religious or educational institution.

That arises in this manner: Decedent, after specific bequests, left the entire residue of the estate, 5/20ths thereof outright to the religious organizations. There is no question, I believe, as to that, although it is not admitted in the pleadings. The other 15/20ths was provided to be left to named trustees who are the plaintiffs herein. Under the terms of the will, these trustees were required to keep the residue, the 15/20ths, of the estate in trust for a period of ten years after decedent's death and to pay so much of the income as the trustees should determine to relatives of the decedent not further removed [2] than first cousins. During the period of the administration of the estate there were no claims made and no disbursements made.

At the termination of the estate, the entire residue so accumulated, the income thereof, was paid over to the trustees. The trustees then, in the years after this, received three claims of which two were allowed. I think it will appear that there were

thirty-seven different persons within this limitation of relationship. Two of the claims were allowed for \$75 a month each. The income of the estate during the course of administration and the trust thereafter has been many times the requirements for distributions or, disbursements, rather.

Our position is that there was no power in the executor during this period of administration to disburse anything and no power in the trustees because they could not receive the power until the estate was closed.

We furthermore contend, under well-recognized cases, that where, as a matter of fact, there is no reasonable possibility that the income which was not used during the year will be used for any private purposes, the income is really being accumulated for the charities, and at the end of the ten-year period the entire residue, with the accumulations, will go to the charities.

I might say, your Honor, that the will provides it shall be distributed only to indigent relatives. There was no distribution to relatives generally. The will used the words "relatives of myself and of my deceased husband, the late Burton E. Carrier, not farther removed than first cousins, who in the judgment of said trustees, are in need of financial assistance, if any there should be, and in such sums as may seem wise to said trustees," and so forth.

We have had around \$20,000 a year annual income from this estate. During the administra-

tion of the estate no one was paid. Since that time and up until very recently there was \$1800 a year, and now \$2400 a year paid to these two beneficiaries.

I think perhaps the position of the defendant is that where there is a possibility that some of this income may be used the accumulated income is not exempt, but I believe, under the cases, that is a question of fact.

Mr. Winter: There is one further question in this case, if the Court please. I have not received my exhibits. I don't know whether I will need them. I don't know whether counsel will have them or not, but I want to ask leave of the Court to put in the exhibits when they are received.

There is one further question in this case, and that is whether plaintiffs have any standing in court to maintain this action. Administratrix paid the taxes and they came out of the estate. We question the right of [4] plaintiffs to maintain this action to enforce their demand. Outside of that, I think counsel has stated the issues very clearly.

The Court: Is this case set for trial?

Mr. Winter: No, your Honor.

The Court: Will there be any testimony, other than documentary evidence?

Mr. Davidson: I believe we will require a little testimony.

The Court: Not very much?

Mr. Davidson: Not very much.

The Court: Is there anything you want to tell me that we do not already know about?

Mr. Winter: No, I think not, your Honor.

The Court: When will you have your papers and when will you be ready for trial? That is the main question. You say you do not have your papers?

Mr. Winter: Well, I have, up to the first of the year, but there are others I think I will require.

The Court: There is nothing more for me to do except to turn you gentlemen over to the Reporter for the purpose of identifying your documents, and then I can go on to other matters. Might we not agree on a trial date?

Mr. Winter: I would like it to go over until after the first of the year. [5]

Mr. Davidson: Any time is all right with us.

The Court: You state when.

Mr. Winter: We have a case set for January 6th. However, we expect we may be able to settle it.

The Court: How about the trial of this case then for that afternoon?

Mr. Winter: Monday, January 6th?

The Court: Yes, in the afternoon.

Mr. Davidson: At 2:00 o'clock?

The Court: Yes. Do you have some documents you want to identify?

Mr. Davidson: Yes, we have, your Honor.

(The following pre-trial exhibits were then marked and identified:)

Plaintiffs' Pre-Trial Exhibits

Exhibit

- | No. | Description |
|-----|--|
| 1. | Copy of income tax return, Estate of Sarah E. Carrier, Deceased, for the year 1940. |
| 2. | Copy of income tax return, Estate of Sarah E. Carrier, for year 1941. |
| 3. | Copy of income tax return, Estate of Sarah E. Carrier, for year 1942. |
| 4. | Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, 1940. |
| 5. | Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, 1941. |
| 6. | Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, 1941. |
| 7. | Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, 1942. |
| 8. | Copy of supplemental claim for refund of tax illegally collected, Estate of Sarah E. Carrier, 1942. |
| 9. | Official denial of claims for 1940 and 1941—Letter dated April 15, 1946. |
| 10. | Official denial of claim for 1942—Letter dated August 29, 1946. |
| 11. | Certified copies of documents In the Matter of the Estate of Sarah E. Carrier, Deceased, including will, final account, supplemental account, order approving final account and distribution, etc. |
| 12. | Certified copies of decree authorizing action of the Trustees under the will, statements of Trustees for years 1945, 1944, 1943, etc. |

Portland, Oregon, January 6, 1947.

PROCEEDINGS OF TRIAL

Mr. Davidson: If the Court please, we have agreed on a pre-trial order.

The Court: Very well.

Mr. Davidson: And at this time I believe counsel for the defendant is willing to stipulate the admission of the exhibits marked at the pre-trial conference.

Mr. Winter: Yes, your Honor.

The Court: Admitted.

(Copy of income tax return, Estate of Sarah E. Carrier, Deceased, for the year 1940, thereupon received in evidence and marked Plaintiffs' Exhibit No. 1.)

(Copy of income tax return, Estate of Sarah E. Carrier, Deceased, for the year 1941, thereupon received in evidence and marked Plaintiffs' Exhibit No. 2.)

(Copy of income tax return, Estate of Sarah E. Carrier, Deceased, for the year 1942, thereupon received in evidence and marked Plaintiffs' Exhibit No. 3.)

(Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, Deceased, 1940, thereupon received in evidenced and marked Plaintiffs' Exhibit No. 4.)

(Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, Deceased, 1941, thereupon received in evidence and marked Plaintiffs' Exhibit No. 5.)

(Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, Deceased, 1941, thereupon received in evidence and marked Plaintiffs' Exhibit No. 6.)

(Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, Deceased, 1942, thereupon received in evidence and marked Plaintiffs' Exhibit No. 7.)

(Copy of supplemental claim for refund of tax illegally collected, Estate of Sarah E. Carrier, Deceased, 1942, thereupon received in evidence and marked Plaintiffs' Exhibit No. 8.)

(Official denial of claims for 1940 and 1941—Letter dated April 15, 1946, thereupon received in evidence and marked Plaintiffs' Exhibit No. 9.)

(Official denial of claim for 1942—Letter dated August 29, 1946, thereupon received in evidence and marked Plaintiffs' Exhibit No. 10.)

(Certified copies of documents In the Matter of the Estate of Sarah E. Carrier, Deceased, including will, final account, supplemental account, order approving final account and distribution, etc., thereupon received in evidence and marked Plaintiffs' Exhibit No. 11.)

(Certified copies of decree authorizing action of the Trustees under the will, statements of Trustees for years 1945, 1944, 1943, etc., thereupon received in evidence and marked Plaintiffs' Exhibit No. 12.)

Mr. Davidson: I might mention briefly the points in this case again. This is a suit for the refund of certain income tax paid by the Estate of Sarah E. Carrier, Deceased, of Salem, Oregon. By the will of Mrs. Carrier she left 5/20ths of the residue to designated charities; the other 15/20ths, by the terms of her will, to be paid to three [10] named Trustees. Under the terms of her will she directed that the trust be continued for ten years after her death and that so much of the income as the Trustees determine to be necessary be paid to certain relatives of herself and her deceased husband, within a certain degree of relationship.

Her death was in January, 1940; the estate was in the course of administration for approximately two years, and at the end of that time this trust was paid over to these Trustees, who received applications from three relatives, and they granted the applications of two of them.

As we understand the Internal Revenue laws, any income of an estate which is paid or permanently set aside for charitable beneficiaries is deductible. Our contention is that all the income was permanently set aside, because no part of it could be used for any private beneficiary.

It is further our contention that if that position is not legally sound, there could be no payment of that income, legally, during the course of administration. In any event, the income of the estate was so much and the claim, potential and actual, were so small that it was practically certain at the end of each year that any income not expended that year for the beneficiaries would never be required to be paid because the subsequent income would be sufficient to take care of them. [11]

I assume your Honor would like to have, and I know we would like to file, a memorandum of our authorities and argument, rather than to argue it orally.

Mr. Winter: This is practically a question of law. I do not think there is going to be any dispute about the facts. It is a question of the construction of the will. Our contentions are set forth on pages 3, 4 and 5 of the pre-trial order. Plaintiffs' contentions are set forth—— Did you finish?

Mr. Davidson: Yes.

Mr. Winter: Plaintiffs' contentions are set forth on page 3. Of course, we contend that the decedent did not mandatorily direct in her will that all of the estate be distributed to these relatives but that she specifically directed that so much of the income, as necessary, should be used by the Trustees in the support of any of her relatives within a certain degree of relationship.

I think we have all the exhibits which will set forth the contentions of the parties, except I do not think we have any copy of the estate tax return in

the case. I think we should have a copy of that tax return and the final determination on that. I wonder if counsel would consent for me to file a certified or photostatic copy of the estate tax return and the deficiency notice, which will show all the facts. [12]

Mr. Davidson: I haven't any objection to it being in there, but I think Mr. Glover, who was attorney for the estate, should be entitled to make any explanation in connection with that that seems necessary.

Mr. Winter: That is satisfactory.

Mr. Davidson: We do not have it here.

Mr. Winter: I thought that was in until I started looking over the exhibits this morning. However, we may be able to get the information from the witnesses, but I would like to reserve the right to ask leave a little later on to supply that.

Mr. Davidson: Very well.

RONALD C. GLOVER

was thereupon produced as a witness on behalf of plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Your name is Ronald C. Glover?

A. Yes.

Q. What is your business or profession?

A. Attorney-at-law.

(Testimony of Ronald C. Glover.)

Q. Where do you reside?

A. Salem, Oregon.

Q. Did you have any relationship with Sarah E. Carrier [13] during her life?

A. Yes, for many years before her death.

Q. You were her attorney? A. I was.

Q. Were you the attorney handling the probate of her estate? A. I was.

Q. Was there any other attorney associated with you on the probate? A. No.

Q. You handled that alone? A. Yes.

Q. You are also one of the plaintiffs, one of the Trustees under the Will of Sarah E. Carrier?

A. I am.

Q. And you are so acting at the present time?

A. I am.

Q. And have been since the trust was set up?

A. Yes, sir.

Q. Mr. Glover, were there any claims filed by any relatives of Mrs. Carrier during the course of the probate of the estate? A. There were.

Q. What disposition was made of them?

A. Two of them——

Q. I mean, during the course of probate? [14]

A. During the course of probate? There were no claims filed during the course of probate.

Q. Were there any inquiries during the course of probate as to rights they might have?

A. A number of them.

Q. What disposition was made of those inquiries?

A. They were informally advised during the

(Testimony of Ronald C. Glover.)

course of probate that the matter of allocation of any funds to any claimant was not up for consideration; that had to await the formation of the trust.

Q. Were all of the beneficiaries of Sarah E. Carrier notified of the provisions of her will?

A. They were all sent a copy of the will.

Q. Up to the present time, how many applications for assistance have there been under the provisions of the will? A. Three.

Q. Will you say who those applicants were? State who those applicants were and what disposition was made of their claims?

A. Two of them were allowed. One of them was Ellen Bell and the other one was Mrs. Royce, relatives of Mrs. Carrier, one on each side of the family. The third application was not finally acted upon. As I recall, he did not finally conclude his application.

Q. So that those two have been the only ones allowed? [15] A. Yes.

Q. Have you had notice that there are any prospective applications?

A. None that I know of, and I think not.

Q. How much was allowed by the Trustees upon each of these applications that were allowed?

A. \$75, originally, each month, and in the last two or three months—I forget just how many—that was increased to \$100 per month.

Q. That would be \$1800 annually, the original allocation for the two, and that has been increased to \$2400 annually, at this time?

A. That is correct.

(Testimony of Ronald C. Glover.)

Q. At the conclusion of the probate, under the terms of the will, 5/20ths was directed to be paid outright to charities and 15/20ths to comprise this trust. Will you explain how that was handled upon closing of the estate?

A. When the estate was closed—there was nothing disposed of during the course of administration in the way of property. There was an accumulation, as I recall, of something like \$42,000 of funds.

All of the assets, as listed in the inventory and appraisement, except some personal property that was sold under authority of the Court and report made, such as personal effects and furnishings and things of that character, [16] were all turned over to the Trust, and two of the Trustees named in the will had died—one of them had died and then there was an alternative Trustee named and he had also died, and two of the Trustees, Dr. Findley and myself, agreed upon Mr. Tinkham Gilbert as the third Trustee.

Mr. Winslow was hired to set up the trust. The trust was set up and the funds in the hands of the Administratrix and the property belonging to the estate was turned over to these Trustees under the terms of the will.

Under the terms of the will, furthermore, 5/20ths went to certain religious organizations named as beneficiaries; the other 15/20ths under the terms of the will was to be held in trust for a period of ten years after the date of her death. The trust was organized on that basis.

(Testimony of Ronald C. Glover.)

Q. How do you handle the accounting of the trust as between the testamentary trust and the Court trust?

A. The testamentary trust, or these 15/20ths, is held in trust and investments are made from time to time of moneys received from the sale of the trust property that has been sold under directions of the Circuit Court, and that money is re-invested when it comes in and as accumulations of funds are received, 5/20ths is turned over to the boards representing these various religious organizations. That is under agreement between them and their representatives and the Trustees of the testamentary trust. [17]

Q. The entire residue, then, has been administered as a single unit but, as the income has come in, it has been distributed to what you call the testamentary trust, or the charities' trust, out of the Court trust?

A. That is right, when we accumulate from ten to twenty thousand dollars, then we have a distribution, not at certain periods of the year, but that is dependent upon when our accumulations get large enough to warrant it.

Q. When did the Trustees take over the property from the estate?

A. I believe it was along about June or July, I forget when, of 1942. I think it might have been March.

Q. March, 1942?

(Testimony of Ronald C. Glover.)

A. Yes. It was about two years—she died January 27, 1940, and I think it was a little over two years after her death.

Mr. Winslow: 1943 is right.

Mr. Davidson: That is all.

Cross-Examination

By Mr. Winter:

Q. You say you have had three applications of blood relatives for assistance?

A. That is right.

Q. When did they file their first application, if you recall, approximately? [18]

A. Shortly after the trust was formed. Miss Bell, who is one of the beneficiaries, was in straitened circumstances during the period of the estate and some inquiry had been had from that family, and, as soon as the trust was formed, I believe it was probably the first one and, shortly after its formation——

Q. The trust was formed about March, 1943, was it not?

A. Well, I am not sure of the year.

Q. March 30, 1943, I think was the date.

A. That is when the estate was closed.

Q. Yes. Shortly after that it was formed?

A. That is right.

Q. When did you receive the second application?

A. Shortly after that. The two were pending on letters during the course of the administration.

(Testimony of Ronald C. Glover.)

Q. Application had been made prior to the closing?

A. Not a formal application. In determining the eligibility of persons who might be expected to receive something, we formulated a questionnaire—the Trustees did—and sent that to them and we required a very formal application and corroboration and also a medical examination.

Q. But you say they had written letters during the course of the administration, about seeking relief?

A. Not so much to me as to the Administratrices. They, the Administratrices, were nieces of Mrs. Carter, and they were [19] all related to these folks, and they visited back and forth and wrote back and forth.

Q. About how much have you paid out of the income of the trust to blood relatives?

A. Just the two.

Q. I mean, approximately how much have they been paid, do you recall?

A. Well, I suppose \$1800 to each of them. That would be \$3600 for the first year and the same the second year and, just recently, we have been paying out—it would be \$2400.

Q. You have no applications now in addition to those?

A. No. That would be \$900 for the year and twice that would be \$1800, instead of \$3600, and then the last should be \$1200 and twice that or \$2400, on that basis. That is all that has been expended.

(Testimony of Ronald C. Glover.)

Q. Did you prepare the estate tax return for the estate? A. I did.

Q. Do you recall if the return was filed about April 4, 1941?

A. I filed it within the eight months period, I think. You mean the state tax?

Q. The estate tax, the Federal Estate Tax.

A. The Federal Estate Tax was filed later. I filed the State of Oregon state tax first. That was within the eight months period, so as to get the discount, and the other one [20] was within the fifteen months period of the date of death.

Q. Then, that was about April 4, 1941?

A. Probably so.

Q. You recall that the gross estate value, the value of the gross estate was about \$334,000?

A. It was something like that.

Q. Of which \$266,000 was claimed as having been bequeathed to charity? A. Yes.

Q. That is about the figure, isn't it?

A. I believe so.

Q. \$266,240.26.

A. The Federal people jumped that up.

Q. I was coming to that. A. Pardon me.

Q. Subsequently, the value of the net estate was increased by the investigating officer by the value of the blood relatives' rights to income, was it not?

A. I don't recall that particular phase of it. I do recall—what I do recall is that the largest asset of the estate was the Meadow River Lumber Company, I believe 1839 shares originally, and there

(Testimony of Ronald C. Glover.)

was some Federal decision in the courts—I believe West Virginia, a West Virginia case—that is where this stock is located, where the corporation is located, in West Virginia. We had passed it through the state court [21] at \$100 per share, or par, and this decision placed the valuation at 107½, and there was insistence on the part of the Federal representatives that that be marked up to 107½.

Q. Don't you recall that the value of the net estate was increased by deducting the value of the rights of the blood relatives to the income under Paragraph 14 of the will? Wasn't there some adjustment made in that?

A. I believe there was. I believe Mr. Harold Hall, who was the representative of the Government handling that matter, had some decision on the matter.

Q. And that deficiency was \$6,000?

A. I am not sure that it was based on that. I think that \$6,000, it seems to me, also included upping of the——

Q. Both things together?

A. Yes, all of them together. These lumber company holdings went in through the state at \$28,500 and they insisted on forcing those to \$42,000, and then there was the Bradford Supply Company and they insisted on a higher valuation for that.

Q. You did not file a petition with the Tax Court to review the determination?

A. No, we didn't.

(Testimony of Ronald C. Glover.)

Q. Did you file a claim for refund of the additional tax?

A. I don't believe we did, during the course of administration. [22]

Mr. Winter: That is all.

A. I went quite fully into the matters of the income tax matters and the estate matters with the representatives of the Government. Mr. Carroll Williams was the income tax man at Salem. He had quite a bunch of decisions before him and he seemed very fair about it, and then Mr. Harold Hall——

Mr. Winter: That is all.

Mr. Davidson: That is all.

(Witness excused.)

TINKHAM GILBERT

was thereupon produced as a witness on behalf of plaintiffs and, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Mr. Gilbert, you are one of the plaintiffs in this case and one of the Trustees under the Will of Sarah E. Carrier, Deceased, I believe?

A. Yes.

Q. Do you handle the accounting for the Trust?

A. Yes.

(Testimony of Tinkham Gilbert.)

Q. Have you done so since it was set up? [23]

A. Yes.

Q. Will you state from your records the amount of money and what other property was received by the Trust from the Estate?

A. The Estate received in cash——

Q. The Trust received in cash?

A. The Trust received in cash, that is right, \$42,542.99 and it received the other properties which were never reduced to a money amount.

Q. You did not attempt to set the other properties up on your books at any particular amount?

A. No. When it was stocks, we just said so many shares, and if there were notes we set them up at the face of the notes without attempting to evaluate them.

Q. How was that cash which was received by the Estate set up on the books?

A. It was set up as a part of the corpus of the Estate.

Q. Mr. Glover explained this arrangement. That figure you gave there was for both the 15/20ths and the 5/20ths? A. That is right.

Q. When did you make your first accounting for the income of the Trust?

A. At the end of the year 1943.

Q. 1943? A. Yes. [24]

Q. That would cover, then, the period from March 30, 1943, to the end of the year?

A. Yes.

(Testimony of Tinkham Gilbert.)

Q. Will you state what the income of the Trust was in that year?

Mr. Winter: We will object to that. I do not see the materiality.

Mr. Davidson: I believe, your Honor, it is material upon the question of whether or not there was any invasion of the accumulated income during that period.

The Court: He may answer, subject to the objection.

(Question read.)

A. The income was \$21,536.02.

Q. (By Mr. Davidson): Is that the net income? A. There were some expenses.

Q. How much were the expenses, including distribution beneficiaries?

A. We paid some of this income tax which is here in question which had not been paid——

Q. Yes.

A. \$2,108.89, and our expenses other than that were \$2,100.

Q. And the income was \$21,536.02?

A. Yes.

Q. How much was paid to blood-relative beneficiaries in that year? [25] A. \$675.

Q. Will you give the same figures for the year 1944?

A. For 1944 the income was \$26,147.74.

Q. And the expenses?

A. The expenses were \$2,540.63.

(Testimony of Tinkham Gilbert.)

Q. And the distribution to blood-relative beneficiaries? A. It should have been \$1,800.

Q. That would have been \$1,800 to these two, \$900 each? A. Yes, that is right, \$1,800.

Q. Do you have the figures for the year 1945?

A. Yes, for 1945 the income was \$23,101.16; payments to relatives, again, \$1,800.

Q. Have you completed your report for the year 1946?

Mr. Winter: I did not get the expenses.

Q. (By Mr. Davidson): Did you give the expenses for 1945?

A. Total expenses for 1945, \$1,486.68.

Q. Will you state, for 1945, what the nature of these expenses was?

A. \$977.23 were expenses in relation to handling the assets. For instance, in the sale of a piece of real estate we had the commission to pay and some title and other expenses.

Q. How much were the Trustees' fees for that year? A. The Trustees' fees are \$900 a year.

Q. \$900?

A. That is for all three Trustees, \$300 each. However, the [26] Trustees' fees are not charged to this fund.

Q. They are not charged to this fund?

A. No.

Q. Before we get to that, do you have your figures for 1946? A. Yes.

Q. Can you tell us what they are?

(Testimony of Tinkham Gilbert.)

A. For 1946—I just have them in the rough here—the total income is \$22,667.09; total expenses, \$694.63.

Q. Now, those figures that you have been giving for 1943, 1944, 1945 and 1946 are income from the Trust which comprises the entire residue and of which the testamentary Trust is only three-quarters? A. That is right.

Q. The distributions that you stated to the blood relatives, of course, came out of the testamentary Trust, to the extent of their share? A. Yes.

Q. The Trustees' fees, as I understand, are \$900 a year and charged against the testamentary Trust after its funds are taken out of this court Trust which comprises the entire residue?

A. That is right.

Q. Are there any other expenses in connection with the testamentary Trust?

A. Attorneys' fees. [27]

Q. Can you tell me how much those have run each year?

A. I can look here. We paid no attorneys' fees in 1943. 1944, we paid a total of \$1,625, which included some fees to the attorneys representing the Trustees and some fees to attorneys representing the beneficiaries of this Trust. In 1945—this is before the testamentary Trust I speak of—

Q. That is right.

A. —attorneys' fees, \$125 and, in 1946, \$300.

Q. Has the interest of the 5/20ths in the residuary Trust, that is in the court Trust, has that been

(Testimony of Tinkham Gilbert.)

reduced by capital distribution; in other words, has that 5/20ths maintained clear up to the present time, or has that been reduced because of distributions to the charities entitled to their 5/20ths?

A. From time to time as we had funds available, we made distributions.

Q. Did they get some principal along with the distribution?

A. Whatever cash—they got whatever cash we had and as we liquidated the principal and turned it into cash, we paid them, regardless of whether it came from principal or income.

Q. You distributed this money from the court Trust to the charities on account of their 5/20ths and the other was put into the account for the testamentary Trust, of which you are one of the Trustees? [28] A. Yes.

Q. How frequently did you make a division of funds?

A. When money was coming in quite actively, we generally waited until we had around \$20,000, and then we divided it up into twentieths—a thousand dollars for each twentieth. At times when we had \$10,000—the distribution depended on the amount of money available.

Q. Have you figures which will show the amount of investments by the Trustees of the moneys received by them as income from the court Trust?

A. Yes. You want to know what?

Q. Is it very detailed?

A. It is not very detailed, no.

(Testimony of Tinkham Gilbert.)

Q. You might give us the dates and amounts that have been invested for the testamentary Trust?

A. During 1944 we purchased \$82,500 of Series G United States Bonds and \$15,000 of 2 per cent coupon bonds.

Q. That was in 1944? A. Yes.

Mr. Winter: Does my objection go to all of this testimony for 1943 and 1944?

The Court: It is so understood.

Mr. Winter: I do not want to interrupt.

A. During 1945 we purchased \$50,000 of 2 per cent coupon bonds and during 1946 we have just purchased \$190,000 of 2 per cent [29] coupon bonds.

We paid some premium on those bonds.

Q. (By Mr. Davidson): That is close enough.

A. The amount of money would not be that, exactly.

Q. This investment in 1944 of \$97,500, that consisted of approximately \$40,000 in cash, plus the income and principal received in the meantime?

A. Yes.

Q. Do you keep any cash on hand at all times?

A. We keep cash available, yes. At the end of 1944 we had \$6,028.43 in this fund.

Q. How did you treat, on your books, these additional securities as they were acquired? How did you set them up on your books?

A. We set them up at cost, as corpus of the Trust, that is, the testamentary Trust.

Mr. Davidson: That is all.

(Testimony of Tinkham Gilbert.)

Cross-Examination

By Mr. Winter:

Q. Do I understand you received \$42,542.99 in cash when the Trust was set up?

A. I am not sure that I have here that figure—\$42,582.99.

Q. Then you said you received what else?

A. Various assets.

Q. Yes.

A. Consisting of real estate and corporate stocks.

Q. Amounting to how much?

A. I don't have any totals.

Q. Didn't you give us the total a few minutes ago?

A. No. We never set any valuation on any of these assets just mentioned. For instance, the stock was listed at so many shares and real estate was just a piece of real estate.

Q. You have been liquidating some of the real estate?

A. Yes. All of the real estate is now liquidated except one contract which is not completely paid.

Q. When you acquire a good deal of cash you distribute it to the 4/5ths interest?

A. 5/20ths.

Q. 5/20ths interest? A. Yes.

Q. And you hold the residue, less what you expend for expenses until the end of the ten-year period, is that your contention? A. Yes.

(Testimony of Tinkham Gilbert.)

Q. Of course, you do not know what the relatives, the immediate blood relatives, might need in the future, do you?

A. No, we have no way of knowing; just estimate that.

Q. Did you have anything to do with the preparation of the Estate tax return? A. No.

Q. You said in 1943 the Trustees paid some \$2100 on income [31] tax? A. Yes.

Q. Was that on the income tax of the income to the Estate? A. Yes.

Q. In other words, when they closed the Estate they just transferred everything they had in the Estate, no matter where they received it from, no matter whether it was income received during the administration or not, is that right?

A. That is right.

Mr. Winter: I think that is all.

(Witness excused.)

Mr. Davidson: That completes the plaintiffs' case.

Mr. Winter: I think, your Honor, we can stipulate, in the event the Court decides adversely to the Government, we will have the amount computed by the Department and the dates of payment, so that there will be no question about it, rather than taking the time of the Court to put in the dates of payment. They have alleged that they paid the tax and we have admitted that it was paid. It is just a question of dates when it was paid.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11732

J. W. MALONEY, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

R. C. GLOVER, M. C. FINDLEY and TINKHAM
GILBERT, Trustees under the Will of Sarah
E. Carrier, deceased,

Appellees.

APPELLANT'S STATEMENT OF POINTS ON
WHICH HE INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF RECORD
FOR PRINTING

Comes now J. W. Maloney, Collector of Internal Revenue for the District of Oregon, appellant above named, and for his statement of points upon which he intends to rely on this appeal adopts the statement of points filed by him in the District Court in connection with his Notice of Appeal and included in the transcript of record prepared and certified by the Clerk of such District Court at page 30 thereof; and appellant designates the entire transcript of record, as prepared and certified by the

Clerk of said District Court, as necessary for the consideration of this appeal.

Dated this 9th day of Sept., 1947.

/s/ HENRY L. HESS,
United States Attorney.

/s/ VICTOR E. HARR,
Assistant United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the United
States Attorney.
Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Appellant's Statement of Points on Which He Intends to Rely on Appeal and Designation of Record for Printing to the United States Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Portland, Oregon, this 9th day of Sept., 1947, by receiving copy thereof, duly certified as such by Thomas R. Winter, of attorneys for the appellant.

/s/ CHARLES P. DUFFY,
Of Attorneys for Appellees.

[Endorsed]: Filed Oct. 3, 1947.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated by and between the appellant, by his attorneys, Henry L. Hess, United States Attorney for the District of Oregon, Victor E. Harr, Assistant United States Attorney, and Thomas R. Winter, Special Assistant to the United States Attorney, and the appellees, by their attorneys, Carl E. Davidson and Charles P. Duffy, that, subject to the discretion of the Court, the exhibits in this case, having been filed and docketed in their original form with the above-entitled Court and while necessary for the consideration of this appeal, need not be printed since they will be available to the Court for inspection and are not, for the most part, susceptible for printing.

Dated this 26th day of Sept., 1947.

/s/ HENRY L. HESS,

United States Attorney.

/s/ VICTOR E. HARR,

Assistant United States Attorney.

/s/ THOMAS R. WINTER,

Special Assistant to the United
States Attorney.

Attorneys for Appellant.

/s/ CARL E. DAVIDSON,

/s/ CHARLES P. DUFFY,

Attorneys for Appellees.

So ordered:

/s/ WILLIAM DENMAN,

Senior United States Circuit Judge.